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COURT OF CRIMINAL APPEALS
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PD-_____
APP. CT. CAUSE NO. 13-19-00237-CR

FILED
COURT OF CRIMINAL APPEALS
7/14/2020
DEANA WILLIAMSON, CLERK

IN THE COURT OF CRIMINAL APPEALS
FOR THE STATE OF TEXAS

DALLAS SHANE CURLEE,

PETITIONER,

VS.

THE STATE OF TEXAS,

RESPONDENT.

On Appeal from Trial Court Cause Number 18-1-10,036;
In the 24th Judicial District Court of Jackson County, Texas,
The Hon. Robert E. Bell, Judge Presiding.

PETITION FOR DISCRETIONARY REVIEW

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DALLAS SHANE CURLEE
July 13, 2020

ORAL ARGUMENT REQUESTED

IDENTITY OF PARTIES AND COUNSEL

Pursuant to TEX. R. APP. P. 38.1(a), the parties to the suit are as follow:

PETITIONER:	**DALLAS SHANE CURLEE**
APPELLEE:	**THE STATE OF TEXAS**
TRIAL JUDGE	**HON. ROBERT E. BELL**
STATE'S ATTY AT TRIAL:	**HON. PAM GUENTHER** **HON. THOMAS J. DILLARD** Assistant District Attorney Jackson Co. District Attorney's Office 115 W. Main, Suite 205 Edna, Texas 77957
DEFENSE ATTY AT TRIAL:	**HON. JOHN C. EVANS** P.O. Box 503 Hallettsville, Texas 77964
APPELLATE STATE'S ATTY:	**HON. DOUG K. NORMAN** Special Prosecutor for Jackson Co. District Attorney's Office 115 W. Main, Suite 205 Edna, Texas 77957
APPELLATE DEFENSE ATTY:	**HON. LUIS A. MARTINEZ** P.O. Box 410 Victoria, Texas 77902

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APP. CT. CAUSE NO. 13-19-00237-CR

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PETITION FOR DISCRETIONARY REVIEW

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

COMES NOW, **DALLAS SHANE CURLEE,** Petitioner in this matter and respectfully submits this PETITION FOR DISCRETIONARY REVIEW arising from the latest judgment and decision of the 13th Judicial District Court of Appeals affirming the conviction imposed in the trial court after a jury convicted him of the offense of "Possession of a Controlled Substance, in a drug free zone."

This appeal originally arises from the 24th Judicial District Court of Jackson

County, Texas, the Honorable Robert E. Bell, Judge Presiding, in District Court Cause Number 18-1-10,036, in which the Petitioner, DALLAS SHANE CURLEE, was the Defendant and the State of Texas was the Plaintiff.

I.

STATEMENT REGARDING ORAL ARGUMENT

Petitioner respectfully requests that this Honorable Court of Criminal Appeals grant review and allow him the opportunity to argue his case before the Court of Criminal Appeals. Petitioner believes that this matter requires that the Court of Criminal Appeals ask his counsel questions regarding the facts and circumstances in this case in order to adequately present his grounds for review. Petitioner believes it to be essential that he, through his counsel, be allowed to interact with the Court of Criminal Appeals to explain his position and interpretation of the cases relied upon.

The issues presented, and their context, appear not to have been addressed by the Court of Criminal Appeals. Oral argument will allow the parties to interactively defend and support, through oral argument, their positions as to other analogous areas of law, tests and standards applicable for review of the issue and questions in this case.

II.

STATEMENT OF THE CASE

Must the State have to provide legally sufficient evidence to support all three parts of the definition of "playground" for purposes of proving a Drug Free Zone enhancement? Petitioner believes that the answer is "Yes."

Petitioner was indicted for possessing methamphetamines within 1,000 feet of a playground. In her indictment, the State alleged that the "playground" was "to wit: First United Methodist Church." On direct appeal, Petitioner specifically argued that the State failed to adduce legally sufficient evidence to show that the area alleged to be a "playground was "open to the public."

The Hon. 13th Court of Appeals' acknowledged on April 30, 2020, in a memorandum opinion, the three prongs of the applicable definition of "playground," including "open to the public," and opined that the drug free zone allegation in Petitioner's case was proven by evidence of distance, fencing and play equipment. Petitioner filed a Motion for Rehearing asking the Court of Appeals to address the issue of "open to the public" and publish the opinion. On June 11, 2020, the Hon. 13th Court of Appeals issued an opinion without adding any further analysis. The June 11, 2020, opinion was ordered published.

There is a dearth of published opinions in Texas addressing the evaluation of "open to the public." At least one sister court believes that there is no presumption

for "open to the public." There seems to be even less authority for how to evaluate the "open to the public" portion of the definition of playground, in the context of legal sufficiency. The Hon. 13th Court of Appeals, focused on evidence that should not be dispositive and implicitly failed to agree that "open to the public" is not presumed by the Drug Free Zone statute and should be proven by legally sufficient evidence.

Petitioner respectfully requests that this Honorable Court of Criminal Appeals address the grounds raised in this Petition for Discretionary Review and clarify for all Texas judges, prosecutors and defense lawyers what is required and legally sufficient to prove that an area is a "playground", specifically what constitutes "open to the public," for purposes of the Drug Free Zone statute.

III.

STATEMENT OF PROCEDURAL HISTORY

Petitioner appealed the conviction and sentence imposed following his trial for "Possession of a Controlled Substance, in a drug free zone," a Third Degree Felony, punished in this case as a second degree felony for "repeat offender" status.

Petitioner was formally charged in Cause No.18-1-10,036; *State of Texas v. Dallas Shane Curlee;* In the 24th Judicial District of Jackson County, Texas, in a single count indictment. The indictment in this cause was filed with the Jackson

County District Clerk on, or about, January 24, 2018. [CR-4]. More specifically, Petitioner was charged in the indictment as follows: "intentionally and knowingly possessing a controlled substance, to wit: Methamphetamine, in an amount by aggregate weight of more than 1 gram but less than 4 grams and said offense occurred in, on or within 1000 feet of a playground to wit: First United Methodist Church, 216 W. Main Street, Edna, Jackson County, Texas." [CR-4].

On, or about, April 22, 2019, Petitioner's jury trial began with *voir dire*. [RR-III-]. Petitioner's trial continued from that day until it was completed with punishment and pronouncement of sentence.

The charge on guilt/innocence that went to the jury included the possession offense and "Special Issue Number 1" concerning whether the State proved beyond a reasonable doubt that the offense of possession was committed within a drug free zone. [CR-113].

On, or about April 24, 2019, after considering the arguments of counsel and the evidence presented by both parties during the guilt/innocence phase of the trial, the jury found Petitioner "guilty" of the offense as charged in the indictment in this matter and finding Special Issue No. 1 in the affirmative. [CR-112-113; 120-123; RR-V-54].

On, or about, April 24, 2019, after considering the arguments of counsel and the evidence presented by both parties during the punishment phase of the trial, the

jury assessed Petitioner's punishment as the maximum amount of imprisonment in the Institutional Division of the Texas Department of Criminal Justice allowed in this case of twenty (20) years, and costs of court. [CR-118; 120-123; RR-V -119-121].

The Trial Court indicated in its "Trial Court's Certification of Defendant's Right of Appeal" that this matter was not a plea bargain case, and that Petitioner had the right to appeal. [CR-119].

Petitioner's Motion for New Trial was timely filed. [CR-152-177]. The Trial Court denied the motion for new trial without a hearing. [CR-180].

Petitioner's Notice of Appeal was timely filed. [CR-126]. Petitioner's appeal proceeded with briefing. Following the briefing in this case, the Honorable 13th Court of Appeals considered Petitioner's appeal by submission. The Honorable 13th Court of Appeals issued an opinion on, or about, April 30, 2020, affirming Petitioner's conviction.

Petitioner timely filed his Motion for Rehearing in accordance with and pursuant to T.R.A.P. 49.1. Petitioner asked that the 13th Court of Appeals analyze and opine on the Drug Free Zone enhancement concerning the sufficiency of the evidence as to whether the play area in question was "open to the public" and asked that the opinion be published. After requesting and receiving briefing from the State, the 13th Court of Appeals granted in part and denied in part Petitioner's

Motion for Rehearing, on, or about June 11, 2020. The Honorable 13th Court of Appeals' June 11, 2020, did not address the "open to the public" issue any further, and ordered the June 11, 2020, be published.

Petitioner timely files, this, his Petition for Discretionary Review.

IV.

GROUNDS FOR REVIEW

In accordance with Rule 68.4 of the Texas Rules of Appellate Procedure, Petitioner presents the following grounds for review:

GROUND FOR REVIEW NUMBER ONE:

> **Under the Drug Free Zone statute, is an area with play equipment presumed to be "open to the public" freeing the State from having to produce legally sufficient evidence at trial?**

GROUND FOR REVIEW NUMBER TWO:

> **Did the 13th Court of Appeals err by improperly analyzing the record for legally sufficient evidence proving that the "playground" was "open to the public" under the Drug Free Zone statute?**

GROUND FOR REVIEW NUMBER THREE:

> **Did the 13th Court of Appeals err in finding that the area where it was alleged that Petitioner possessed drugs was a "playground" as defined by the Drug Free Zone statute?**

V.

ARGUMENT

GROUND FOR REVIEW NUMBER ONE RESTATED:

> **Under the Drug Free Zone statute, is an area with play equipment presumed to be "open to the public" freeing the State from having to produce legally sufficient evidence at trial?**

The Texas Controlled Substances Act provides that a person commits the offense of possession of a controlled substance if he, or she, knowingly or intentionally possesses a controlled substance listed in Penalty Group 1. TEX. HEALTH & SAFETY CODE §481.102(6), § 481.115(a). An offense under Subsection (a) is a felony of the third degree if the amount of the controlled substance possessed is, by aggregate weight, including adulterants or dilutants, one gram or more, but less than four grams. TEX. HEALTH & SAFETY CODE §481.115(c). The Texas Controlled Substances Act, in §481.134 *et. seq*., also provides for an enhancement if, among other places, a person commits an offense within 1000 feet of a playground. The enhancement affects the punishment ranges, minimum sentences and maximum fines that apply to drug offenses found in the Texas Controlled Substance Act, as well as limits concurrent sentencing with other punishments. *See* TEX. HEALTH & SAFETY CODE §481.134(b-f); (h). Further, the Drug Free Zone enhancement affects parole eligibility.

In §481.134(a)(3), "playground" is defined as follows:

> "Playground" means any outdoor facility that is not on the premises of a school and that:
>
> (A) is intended for recreation;
>
> (B) is open to the public; and
>
> (C) contains three or more play stations intended for the recreation of children, such as slides, swing sets, and teeterboards.

See TEX. HEALTH & SAFETY CODE §481.134(a)(3). As the 13th Court of Appeals acknowledged, there are three parts of the definition of a "playground." *Dallas Shane Curlee v. State of Texas*, No. 13-19-00237-CR, page 7, (Tex. App.—Corpus Christi, June 11, 2020)(ordered published)(citing TEX. HEALTH & SAFETY CODE ANN §481.134(a)(3)). It appears from the plain text of the definition that all three requirements should be met, including §481.134(a)(3)(B) which reads: "is open to the public; ***and***…." *See* §481.134(a)(3)(emphasis added). The "and" suggests that all three parts of the definition must be met to prove that an area is a "playground," rather than each individual part supporting the finding of "playground," in and of itself. It should be presumed that the Texas Legislature knew the effect of adding the "and" to the definition rather than an "or," and intended for the each of the sections in (A),(B), and (C) to be met and proven.

The Petitioner and the State were able to find and cite two published opinions from two different sister courts. One finds that there is no presumption

when it comes to "open to the public" with respect to a "playground" for purposes of the Drug Free Zone statute. The other does not seem to contradict this point. If there is no presumption, legally sufficient evidence must be presented for each of the parts of the definition.

The Texarkana Court of Appeals has found that there is no presumption with respect to "open to the public." *Ingram v. State*, 213 S.W.3d 515, 518-520 (Tex. App.—Texarkana 2007, no pet.). In the other published opinion discussed in the briefing to the 13th Court of Appeals, the 14th District Court of Appeals in Houston does not seem to contradict the *Ingram* court on this point. *See Graves v. State*, 557 S.W.3d 863 (Tex. App.—Houston [14th Dist.]. 2018). Regardless of a presumption, both cases adopted different approaches on how to evaluate the legal sufficiency, most likely because of the records before them.

This ground for review is simple to answer. The Texas Legislature defined what a playground is and no part of it should be ignored, nor proof for same be unnecessary at trial. The rules and standards for interpretation of statutes and the definitions they contain clearly support this answer. Put simply, there is no presumption that can be made for any of the parts of the definition at issue in this appeal, least of all, "open to the public."

GROUND FOR REVIEW NUMBER TWO RESTATED:

Did the 13th Court of Appeals err by improperly analyzing the record for legally sufficient evidence proving that the "playground" was "open to the public" under the Drug Free Zone statute?

The 13th Court of Appeals improperly analyzed the record for the question before them: was the area alleged by the State at trial as a "playground" proven to be "open to the public." In response to the briefing and issues raised on direct appeal, the 13th Court of Appeals provided the following reasoning and finding in both the April and June opinions:

> "According to Smejkal's trial testimony, there was a church playground one block from where Hammond's van was parked and across the street. According to Google Maps, the distance was 547.38 feet from Hammond's van. Smejkal also measured the distance of 539.2 feet from Hammond's parking space to the middle of the playground with a rolling tape-measure he borrowed from the City of Edna. He did not calibrate the rolling tape and could not testify to its accuracy. Smejkal personally confirmed that none of the various gates to the playground were locked except one.
>
> The photographs in evidence demonstrate a large play area with two slides, a playscape, a tube, and monkey bars. The large grassy area that surrounds that playground is fenced with multiple entrances, only one of which is capable of being locked. Both measurements of the distance between where Hammond's van was parked and where the playground is located, one-and-a-half blocks away, equated to less than 550 feet. The standard for finding the distance to be a drug-free zone is within 1000 feet. The jury's answer is supported by legally sufficient evidence."

Dallas Shane Curlee v. State of Texas, No. 13-19-00237-CR, pages 7-8, (Tex. App.—Corpus Christi, June 11, 2020)(ordered published). It is valid to interpret the above as failing to properly address the "open to the public" issue. The only interpretation supporting that the 13th Court of Appeals addressed the "open to the public" issue at all is to point to the reference to the fencing and the ability for the fencing to be locked. The latter is not supportable upon further review and consideration.

If common knowledge, observation and experience gained in ordinary affairs is to be considered, gates, fences and locks mean one thing: not everyone is welcome. Mere accessibility, or the ability to access an area that is fenced is not a public invitation. If the opposite were true, a trespasser could argue that some area was "open to the public" because of the ease with which he could get around the gates or other security apparatus intended to keep people out. For further consideration, Petitioner asks this Court of Criminal Appeals to consider the following: if parents put play equipment in their *unfenced* back yard, is that also a "playground" that is "open to the public?" Petitioner believes this is not the case. Fencing, or lack thereof, ability to access or not access a place, easily or with difficulty does not determine whether a place is "open to the public." The Texarkana Court of Appeals would seem to agree.

Specifically referring to fencing when addressing a similar challenge to "open to the public," the Texarkana Court of Appeals wrote: "We note that city-owned public playgrounds are often fenced, but are in fact open for public use, and ***do not agree that fencing or the lack thereof would be dispositive.***" *Ingram v. State*, 213 S.W.3d 515, 518 (Tex. App.--Texarkana 2007)(emphasis added).

Put simply, the only evidence cited by the 13th Court of Appeals to support its ultimate conclusion related to the fencing. Fencing, or the lack thereof, is not and should not be dispositive for determining whether a place is "open to the public" for purposes of the Drug Free Zone statute. The 13th Court of Appeals erred in its analysis of the record of this case.

GROUND FOR REVIEW NUMBER THREE RESTATED:

> **Did the 13th Court of Appeals err in finding that the area where it was alleged that Petitioner possessed drugs was a "playground" as defined by the Drug Free Zone statute?**

Admittedly, the approach to analyzing whether there is legally sufficient evidence proving beyond a reasonable doubt that an area is "open to the public," and especially in the context of this case, is difficult to pinpoint. There appears to be little precedent in Texas jurisprudence for how an appellate court in Texas should analyze this issue and what facts must be shown to sustain the State's burden. Both Petitioner and the State were only able to point to two published cases that seemed to reflect the issue raised in this appeal. Both Petitioner and the

State addressed both of them in their respective briefing in this case. Neither Petitioner, nor the State, cited any authority from the Court of Criminal Appeals, nor was any cited in the opinion issuing from the Hon. 13th Court of Appeals.

Petitioner believes that *Ingram*, is instructive for the resolution of this case. The Texarkana Court of Appeals noted in support of its decision:

> The question is actually whether the jury could reasonably infer from the evidence before it the facility was public in nature. The ownership of the park by an alumni association, generally a private organization, does not assist in the determination that the park is open to the public. The fact that a baseball field was on the property adds little, as there is likewise no proof that it is open to use by the public. The fact the property was located near a residential area and contained playground equipment shows no more than that some children may use the facility — not that the public at large had access or permission to use the property. It is not uncommon for a group of home-owners in a neighborhood to provide a playground and limit its use to the children living in the neighborhood.
>
> This record contains nothing else that supports the conclusion the outdoor recreational facility was open to the public. The statute contains no presumption in that regard, and we cannot assume from the evidence provided, or from any reasonable inferences raised from that evidence, that the facility was one that was open to the public.

Ingram v. State, 213 S.W.3d 515, 518-19 (Tex. App.--Texarkana 2007). Between *Ingram* and this case, the similarities are easy to see. The record contains no evidence that the church or its adjacent areas were on public land. Similarly, there

was no evidence or testimony that the First United Methodist Church is a public institution. There was also no evidence that the "playground" was intended to be used by any and all members of the public or passerby, rather than for the benefit of its church membership. Assuming *arguendo* that the fencing being capable or incapable of being locked is relevant to the analysis in this case, the evidence at trial still does not justify the 13th Court of Appeals' conclusion. Just because it is possible that the public could potentially gain access to the area in question through an unlocked portion of the fencing, does not establish that it is indeed "open to the public."

Put simply, the 13th Court of Appeals erred in finding that the area in question in this appeal was a "playground" because there was no proper evidence, either direct, or that could provide a reasonable inference, supporting the conclusion that the area located at the First United Methodist Church with play equipment was "open to the public."

VI.

CONCLUSION AND PRAYER

WHEREFORE, for the reasons set forth above, Petitioner submits that the 13th Court of Appeals erred in affirming Petitioner's conviction and Petitioner prays that the Court of Criminal Appeals grant this Petition for Discretionary Review and allow Petitioner to brief the grounds raised in this petition, and allow

oral argument. Following the briefing and oral argument, Petitioner respectfully prays that this Honorable Court reverse and/or reform the sentence below and/or reverse and remand this case to the 13th Court of Appeals for further proceedings, and/or to reverse and directly remand Petitioner's case to the Trial Court for a new trial on guilt innocence and/or punishment. Petitioner further prays for general relief, and any other relief he is entitled to in law or in equity.

Respectfully Submitted,

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By: 

Luis A. Martinez
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ATTORNEY FOR PETITIONER
DALLAS SHANE CURLEE

VII.

CERTIFICATE OF COMPLIANCE

In accordance with Texas Rule of Appellate Procedure 9.4(i)(3), the undersigned, Luis A. Martinez, I hereby certify that the number of words in the above Petition for Discretionary Review, excluding those matters listed in Rule

9.4(i)(3), is 3,375 words.

Luis A. Martinez

VIII.

CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing document was served upon the persons below in the manner indicated on this 13th day of July, 2020, pursuant to the Texas Rules of Appellate Procedure.

Luis A. Martinez

Via Email: douglas.norman@nuecesco.com
The Hon. Douglas K. Norman
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IX.

APPENDIX

1. Opinion of the 13th Court of Appeals in Cause No. 13-19-00237-CR;, *Dallas Shane Curlee* issued on, or about, April 30, 2020.

2. Judgment of the 13th Court of Appeals in Cause No. 13-19-00237-CR; *Dallas Shane Curlee,* issued on, or about April 30, 2020.

3. Opinion of the 13th Court of Appeals in Cause No. 13-19-00237-CR;, *Dallas Shane Curlee* issued on, or about, June 11, 2020.

4. Judgment of the 13th Court of Appeals in Cause No. 13-19-00237-CR; *Dallas Shane Curlee,* issued on, or about June 11, 2020.

APPENDIX 1

NUMBER 13-19-00237-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

DALLAS SHANE CURLEE, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the 24th District Court of Jackson County, Texas.

MEMORANDUM OPINION

Before Justices Benavides, Perkes, and Tijerina
Memorandum Opinion by Justice Benavides

Appellant Dallas Shane Curlee appeals his conviction for possession of a controlled substance in penalty group one, methamphetamine, less than four grams, in a drug free zone, a third-degree felony. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.115(c). Curlee's punishment level was enhanced to that of a second-degree felony based on his prior convictions. *See* TEX. PENAL CODE ANN. § 12.42(a). Curlee challenges his conviction

on three grounds: (1) the evidence is insufficient to establish that he had possession of the methamphetamine; (2) the evidence is insufficient to establish the requisites of the drug-free zone enhancement; and (3) the trial court erred by failing to hold a hearing on Curlee's motion for new trial. We affirm.

I. BACKGROUND

Jailer Dave Thedford testified at trial that Hillary Hammond went to the Jackson County Jail on December 7, 2017, to visit inmate Anthony Havens. She brought with her a plastic Wal-Mart bag with five boxes of contact lenses. When Thedford searched the bag, he found four utility razor blades in one of the contact lenses boxes. Hammond claimed she did not intend to bring the razor blades into the jail; they were for the utility knife on her keychain. She explained she purchased them at the same time as some other items from Wal-Mart and the receipt was in her van which was parked out front. Razors are contraband in the jail and bringing them into the jail is a felony offense. *See* TEX. PENAL CODE ANN. § 38.11(a)(2), (g).

Jackson County Sheriff's Investigator Gary Wayne Smejkal and Jail Captain Jim Omecinski accompanied Hammond to her van. When they approached the van, neither of the officers saw anyone sitting in the vehicle. Once Hammond opened the driver's door, they saw a man on the bench seat in the back who was later identified as Curlee. Hammond was under arrest for bringing contraband into the jail and she asked if the van could be released to Curlee. Smejkal provisionally agreed and asked Curlee for his driver's license. Smejkal checked to determine whether Curlee's license was valid and whether there were any warrants. Because there was a warrant for his arrest, Smejkal

handcuffed Curlee and placed him under arrest as well. Curlee said, that they should not go into the van “unless they brought a drug dog.” Smejkal and Investigator Jeremy Crull inventoried the van before it was impounded.

During the inventory search of the van, Smejkal found a black baseball cap on the floor in front of the rear bench seat where Curlee had been seated. It was upside down and was being used to hold a pack of Marlboro Red cigarettes in a box, a cell phone belonging to Curlee, a lottery ticket, a glass pipe, a syringe, a Recon 1 pocketknife, and a propane torch igniter. Inside the Marlboro Red box were three small yellow bags that contained a white crystal substance that was later determined to be methamphetamine. There was also a brown purse that belonged to Hammond in the front of the van between the seats. The purse contained some cash, a glass pipe, and several small baggies that contained methamphetamine.

At trial, a chemist from the Department of Public Safety testified that she tested the substance found in the baggies inside the Marlboro Red box and it was methamphetamine with a net weight of approximately 1.97 grams.

Smejkal further testified that he investigated whether a church playground across the street from where Hammond’s van was parked and on the next block was within 1000 feet of the van. He performed a Google Map search which indicated the distance between the van and the playground was 547.38 feet. He testified that the church playground was kept unlocked. Later during the trial, he testified regarding his further investigation of the playground gates, that only one of the gates was capable of being locked.

Curlee was indicted for possession of the methamphetamine in a drug-free zone because Hammond's van was within 1000 feet of a church playground that is open to the public. He was convicted at trial and the jury sentenced him to twenty years' imprisonment in the Texas Department of Corrections–Institutional Division. Curlee appeals from that judgment.

II. SUFFICIENCY OF THE EVIDENCE

Curlee's first two issues challenge the sufficiency of the evidence of (1) possession of the methamphetamine found in the Marlboro Red cigarette pack and (2) the elements of the drug free zone enhancement. Both are measured by the same sufficiency test. *See Young v. State* 14 S.W.3d 748, 753 (Tex. Crim. App. 2000).

A. Standard of Review

"The Constitution prohibits the criminal conviction of any person except upon proof of guilt beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (citing *In re Winship*, 397 U.S. 358, 361 (1970)). We apply the sufficiency standard from *Jackson*, which requires the reviewing court to "view[] the evidence in the light most favorable to the prosecution," to determine whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010) (citing *Jackson*, 443 U.S. at 319). When a reviewing court views the evidence in the light most favorable to the verdict, it "is required to defer to the jury's credibility and weight determinations because the jury is the sole judge of the witnesses' credibility and the weight to be given their testimony." *Brooks*, 323 S.W.3d at 899; *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007) (citing *Jackson*, 443 U.S.

at 318–19). “Circumstantial evidence is as probative as direct evidence in establishing the guilt of an actor, and circumstantial evidence alone can be sufficient to establish guilt.” *Hooper*, 214 S.W.3d at 13. If the record supports conflicting inferences, we presume that the fact finder resolved the conflict in favor of the prosecution and defer to that resolution. *Garcia v. State*, 367 S.W.3d 684, 686–87 (Tex. Crim. App. 2012); *Brooks*, 323 S.W.3d at 899.

“Constitutional review of the sufficiency of the evidence is measured against the elements of the criminal offense as defined by state law.” *Fuller v.* State, 73 S.W.3d 250, 253 (Tex. Crim. App. 2002) (citing *Jackson*, 443 U.S. at 324 n.16). However, review of the “sufficiency of the evidence should be measured by the elements of the offense as defined by the hypothetically correct jury charge for the case.” *Garcia*, 367 S.W.3d at 687 (quoting *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997)).

B. Methamphetamine

The methamphetamine at issue was found inside the box of Marlboro Reds, which was inside the upside down baseball cap on the floorboard of the van in front of the bench seat where Curlee was seated when the officers took Hammond to her van. Curlee was at that time an admitted smoker and IV user of methamphetamine. There was a glass pipe and syringe in the cap as well as a propane igniter, a pocketknife, Curlee’s phone, and a lottery ticket.

Hammond testified that she left her purse in the car in which there was some methamphetamine, a glass pipe, and some cash. She had taken her phone and keys into the jail with her and put them in a lock box before going to see inmate Havens. Hammond

was charged with two counts of taking a prohibited weapon into a correctional facility, each a third-degree felony with a recommended sentence of five years' imprisonment. Hammond was later charged with possession of less than a gram of methamphetamine based upon the drugs in her purse. She testified at Curlee's trial that she smoked cigarettes, Marlboro Reds in a box, and the methamphetamine in the cigarette box belonged to her. Curlee would not have known she had it. She claimed that before she went into the jail, she had the syringe in her bra and moved to the back of the van to remove everything from her person anything she could not take into the jail.

Curlee gave a statement the day he was arrested, after he waived his *Miranda*[1] rights. He volunteered to "take the weight" of the drugs in the purse if Hammond's contraband charge was dropped. He stated that he wanted to protect Hammond so she could be home at Christmas with her little girl, and that his mom would bail her out. However, Curlee acknowledged that the drugs in her purse were not credibly his, especially since there was a separate pipe in her purse.

Despite Hammond's testimony, there was evidence from which the jury could have believed that Curlee had possession of the drugs in the cigarette box: the drugs were in close proximity to him and his possessions such as the phone, the jury could have believed that the pipe and syringe were his in light of his admitted use and Hammond's separate possession of a glass pipe, and his statement about bringing a drug dog to search the van. When the evidence is conflicting, the jury is entitled to decide which witnesses to believe. *See Garcia*, 367 S.W.3d at 686–87.

[1] *Miranda v. Arizona*, 384 U.S. 436, 467–68 (1966).

We overrule Curlee's first issue.

C. Drug-Free Zone

Curlee next challenges the sufficiency of the evidence to prove the enhance for a drug-free zone. The legislature prescribes enhanced sentencing guidelines if an individual commits a drug crime in a "drug-free zone"—i.e., within a certain distance of various statutorily defined facilities. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.134. Here, the State alleged that Curlee possessed methamphetamine within 1,000 feet of a "playground," as defined by § 481.134(a)(3). *Id.* Subsection (a)(3) defines a "playground" as: any outdoor facility that is not on the premises of a school and that: (A) is intended for recreation; (B) is open to the public; and (C) contains three or more play stations intended for the recreation of children, such as slides, swing sets, and teeterboards. *Id.; Graves v. State*, 557 S.W.3d 863, 866 (Tex. App.—Houston [14th Dist.] 2018, no pet.).

According to Smejkal's trial testimony, there was a church playground one block from where Hammond's van was parked and across the street. According to Google Maps, the distance was 547.38 feet from Hammond's van. Smejkal also measured the distance of 539.2 feet from Hammond's parking space to the middle of the playground with a rolling tape-measure he borrowed from the City of Edna. He did not calibrate the rolling tape and could not testify to its accuracy. Smejkal personally confirmed that none of the various gates to the playground were locked except one.

The photographs in evidence demonstrate a large play area with two slides, a playscape, a tube, and monkey bars. The large grassy area that surrounds that playground is fenced with multiple entrances, only one of which is capable of being

locked. Both measurements of the distance between where Hammond's van was parked and where the playground is located, one-and-a-half blocks away, equated to less than 550 feet. The standard for finding the distance to be a drug-free zone is within 1000 feet. The jury's answer is supported by legally sufficient evidence.

We overrule Curlee's second issue.

III. MOTION FOR NEW TRIAL

By his third issue, Curlee argues that the trial court erred by failing to hold a hearing on his motion for new trial, which he timely presented to the trial court, and requested a hearing. Curlee's motion for new trial complained in part of "outside influence" on the jury based on the notation in Jury Note 3, "Talked to Pastor."

A. Standard of Review

A trial court's denial of a hearing on a motion for new trial is reviewed for an abuse of discretion. *Hobbs v. State*, 298 S.W.3d 193, 200 (Tex. Crim. App. 2009). The trial court's decision is reversed only if it was outside the zone of reasonable disagreement. *Smith v. State*, 286 S.W.3d 333, 339 (Tex. Crim. App. 2009). The purposes of a new trial hearing are to (1) determine whether the case should be retried; or (2) complete the record for presenting issues on appeal. *Hobbs*, 298 S.W.3d at 199. A hearing on a motion for new trial is not an absolute right. *Id*.; *Rozell v. State*, 176 S.W.3d 228, 230 (Tex. Crim. App. 2005). A trial court abuses its discretion in failing to hold a hearing if the motion and accompanying affidavits (1) raise matters that are not determinable from the record; and (2) establish reasonable grounds showing that the defendant could potentially be entitled to relief. *Hobbs*, 298 S.W.3d at 199; *see also Bolivar v. State*, No. 13-14-00157-CR, 2016

WL 4939384, at *17 (Tex. App.—Corpus Christi–Edinburg Sept. 15, 2016, pet. ref'd) (mem. op.) (not designated for publication).

B. Discussion

During Investigator Smejkal's testimony regarding the church playground, he was asked by the prosecutor how he knew the playground was unlocked, and he replied that he spoke to the pastor. Defense counsel objected to hearsay and the trial court sustained the objection. The trial court responded after discussing the jury's note with the prosecutor and defense counsel. The trial judge told the jury in writing that he and the court reporter would look for the testimony over the lunch break. As the trial court discussed with counsel in Curlee's presence, the response, "Talked to the Pastor," was hearsay to which an objection had been sustained and would not be provided to the jurors when they came back into the courtroom.[2]

Appellate counsel's motion for new trial claims an outside influence on the jury that did not actually occur. Instead the evidence he relies on refers to an evidentiary matter that occurred during trial and not outside the record. As a result, the trial court was not required to hold a hearing. *See Sandoval v. State*, 929 S.W.2d 34, 36 (Tex. App.—Corpus Christi–Edinburg 1996, pet. ref'd) (holding that trial court did not abuse its discretion in

[2] Before the trial court brought the jury back in to read the requested testimony, he advised the parties:

> THE COURT: Back on the record after a question from the jury about read-back. Here is the question that was asked: "Please provide Investigator Smejkal's testimony regarding church/playground and locks. Testimony was 4/23/19, particularly on whether public property or not, signed Carley Smith. Also talked with pastor." Okay. I'm going to go through —I've searched the record. Anything that has to do with that question I'm going to read to the jury. I will tell everybody on the—"also talked with pastor," that's—will not come in because the question was, "How do you—Smejkal, how do you know that it's public property?" And Smejkal said, "I talked with the pastor." The objection was hearsay, and it was sustained, so that won't come in.

denying hearing on motion for new trial where reasonable grounds to believe a new trial was warranted were not shown). Thus, the trial court did not abuse its discretion by denying the motion without a hearing. *Id.*

We overrule Curlee's third issue.

IV. CONCLUSION

We affirm the judgment of the trial court.

GINA M. BENAVIDES,
Justice

Do not publish.
TEX. R. APP. P. 47.2 (b).

Delivered and filed the
30th day of April, 2020.

APPENDIX 2

THE THIRTEENTH COURT OF APPEALS

13-19-00237-CR

DALLAS SHANE CURLEE
v.
THE STATE OF TEXAS

On Appeal from the
24th District Court of Jackson County, Texas
Trial Cause No. 18-1-10,036

JUDGMENT

THE THIRTEENTH COURT OF APPEALS, having considered this cause on appeal, concludes that the judgment of the trial court should be AFFIRMED. The Court orders the judgment of the trial court AFFIRMED.

We further order this decision certified below for observance.

April 30, 2020

APPENDIX 3

NUMBER 13-19-00237-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

DALLAS SHANE CURLEE, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the 24th District Court of Jackson County, Texas.

OPINION

Before Justices Benavides, Perkes, and Tijerina
Opinion by Justice Benavides

Appellant Dallas Shane Curlee appealed his conviction for possession of a controlled substance in penalty group one, methamphetamine, less than four grams, in a drug free zone, a third-degree felony. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.115(c). Curlee's punishment level was enhanced to that of a second-degree felony based on his

prior convictions. *See* TEX. PENAL CODE ANN. § 12.42(a). Curlee challenges his conviction on three grounds: (1) the evidence is insufficient to establish that he had possession of the methamphetamine; (2) the evidence is insufficient to establish the requisites of the drug-free zone enhancement; and (3) the trial court erred by failing to hold a hearing on Curlee's motion for new trial. We affirm. [1]

I. BACKGROUND

Jailer Dave Thedford testified at trial that Hillary Hammond went to the Jackson County Jail on December 7, 2017, to visit inmate Anthony Havens. She brought with her a plastic Wal-Mart bag with five boxes of contact lenses. When Thedford searched the bag, he found four utility razor blades in one of the contact lenses boxes. Hammond claimed she did not intend to bring the razor blades into the jail; they were for the utility knife on her keychain. She explained she purchased them at the same time as some other items from Wal-Mart and the receipt was in her van which was parked out front. Razors are contraband in the jail and bringing them into the jail is a felony offense. *See* TEX. PENAL CODE ANN. § 38.11(a)(2), (g).

Jackson County Sheriff's Investigator Gary Wayne Smejkal and Jail Captain Jim Omecinski accompanied Hammond to her van. When they approached the van, neither of the officers saw anyone sitting in the vehicle. Once Hammond opened the driver's door,

[1]Curlee has filed a motion for rehearing through which he contends that we erred in affirming his conviction with the enhancement for drug-free zone and requests that we change the notation on our memorandum opinion from "do not publish" to "publish" and change the designation of our opinion here from a memorandum opinion to an opinion. *See* TEX. R. APP. P. 47.2(a),(b). We grant Curlee's motion for rehearing in part and deny it in part. We grant Curlee's motion insofar as it requests that we change the designation and publication recommendation of our memorandum opinion. Accordingly, we withdraw our memorandum opinion previously issued in this case on April 30, 2020, and the accompanying judgment, and we issue this opinion and associated judgment in their stead. We deny all other relief sought.

they saw a man on the bench seat in the back who was later identified as Curlee. Hammond was under arrest for bringing contraband into the jail and she asked if the van could be released to Curlee. Smejkal provisionally agreed and asked Curlee for his driver's license. Smejkal checked to determine whether Curlee's license was valid and whether there were any warrants. Because there was a warrant for his arrest, Smejkal handcuffed Curlee and placed him under arrest as well. Curlee said, that they should not go into the van "unless they brought a drug dog." Smejkal and Investigator Jeremy Crull inventoried the van before it was impounded.

During the inventory search of the van, Smejkal found a black baseball cap on the floor in front of the rear bench seat where Curlee had been seated. It was upside down and was being used to hold a pack of Marlboro Red cigarettes in a box, a cell phone belonging to Curlee, a lottery ticket, a glass pipe, a syringe, a Recon 1 pocketknife, and a propane torch igniter. Inside the Marlboro Red box were three small yellow bags that contained a white crystal substance that was later determined to be methamphetamine. There was also a brown purse that belonged to Hammond in the front of the van between the seats. The purse contained some cash, a glass pipe, and several small baggies that contained methamphetamine.

At trial, a chemist from the Department of Public Safety testified that she tested the substance found in the baggies inside the Marlboro Red box and it was methamphetamine with a net weight of approximately 1.97 grams.

Smejkal further testified that he investigated whether a church playground across the street from where Hammond's van was parked and on the next block was within 1000

feet of the van. He performed a Google Map search which indicated the distance between the van and the playground was 547.38 feet. He testified that the church playground was kept unlocked. Later during the trial, he testified regarding his further investigation of the playground gates, that only one of the gates was capable of being locked.

Curlee was indicted for possession of the methamphetamine in a drug-free zone because Hammond's van was within 1000 feet of a church playground that is open to the public. He was convicted at trial and the jury sentenced him to twenty years' imprisonment in the Texas Department of Corrections–Institutional Division. Curlee appeals from that judgment.

II. SUFFICIENCY OF THE EVIDENCE

Curlee's first two issues challenge the sufficiency of the evidence of (1) possession of the methamphetamine found in the Marlboro Red cigarette pack and (2) the elements of the drug free zone enhancement. Both are measured by the same sufficiency test. *See Young v. State* 14 S.W.3d 748, 753 (Tex. Crim. App. 2000).

A. Standard of Review

"The Constitution prohibits the criminal conviction of any person except upon proof of guilt beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (citing *In re Winship*, 397 U.S. 358, 361 (1970)). We apply the sufficiency standard from *Jackson*, which requires the reviewing court to "view[] the evidence in the light most favorable to the prosecution," to determine whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010) (citing *Jackson*, 443 U.S. at 319). When a reviewing

court views the evidence in the light most favorable to the verdict, it "is required to defer to the jury's credibility and weight determinations because the jury is the sole judge of the witnesses' credibility and the weight to be given their testimony." *Brooks*, 323 S.W.3d at 899; *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007) (citing *Jackson*, 443 U.S. at 318–19). "Circumstantial evidence is as probative as direct evidence in establishing the guilt of an actor, and circumstantial evidence alone can be sufficient to establish guilt." *Hooper*, 214 S.W.3d at 13. If the record supports conflicting inferences, we presume that the fact finder resolved the conflict in favor of the prosecution and defer to that resolution. *Garcia v. State*, 367 S.W.3d 684, 686–87 (Tex. Crim. App. 2012); *Brooks*, 323 S.W.3d at 899.

"Constitutional review of the sufficiency of the evidence is measured against the elements of the criminal offense as defined by state law." *Fuller v.* State, 73 S.W.3d 250, 253 (Tex. Crim. App. 2002) (citing *Jackson*, 443 U.S. at 324 n.16). However, review of the "sufficiency of the evidence should be measured by the elements of the offense as defined by the hypothetically correct jury charge for the case." *Garcia*, 367 S.W.3d at 687 (quoting *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997)).

B. Methamphetamine

The methamphetamine at issue was found inside the box of Marlboro Reds, which was inside the upside down baseball cap on the floorboard of the van in front of the bench seat where Curlee was seated when the officers took Hammond to her van. Curlee was at that time an admitted smoker and IV user of methamphetamine. There was a glass pipe and syringe in the cap as well as a propane igniter, a pocketknife, Curlee's phone,

and a lottery ticket.

Hammond testified that she left her purse in the car in which there was some methamphetamine, a glass pipe, and some cash. She had taken her phone and keys into the jail with her and put them in a lock box before going to see inmate Havens. Hammond was charged with two counts of taking a prohibited weapon into a correctional facility, each a third-degree felony with a recommended sentence of five years' imprisonment. Hammond was later charged with possession of less than a gram of methamphetamine based upon the drugs in her purse. She testified at Curlee's trial that she smoked cigarettes, Marlboro Reds in a box, and the methamphetamine in the cigarette box belonged to her. Curlee would not have known she had it. She claimed that before she went into the jail, she had the syringe in her bra and moved to the back of the van to remove everything from her person anything she could not take into the jail.

Curlee gave a statement the day he was arrested, after he waived his *Miranda*[2] rights. He volunteered to "take the weight" of the drugs in the purse if Hammond's contraband charge was dropped. He stated that he wanted to protect Hammond so she could be home at Christmas with her little girl, and that his mom would bail her out. However, Curlee acknowledged that the drugs in her purse were not credibly his, especially since there was a separate pipe in her purse.

Despite Hammond's testimony, there was evidence from which the jury could have believed that Curlee had possession of the drugs in the cigarette box: the drugs were in close proximity to him and his possessions such as the phone, the jury could have

[2] *Miranda v. Arizona*, 384 U.S. 436, 467–68 (1966).

believed that the pipe and syringe were his in light of his admitted use and Hammond's separate possession of a glass pipe, and his statement about bringing a drug dog to search the van. When the evidence is conflicting, the jury is entitled to decide which witnesses to believe. *See Garcia*, 367 S.W.3d at 686–87.

We overrule Curlee's first issue.

C. Drug-Free Zone

Curlee next challenges the sufficiency of the evidence to prove the enhance for a drug-free zone. The legislature prescribes enhanced sentencing guidelines if an individual commits a drug crime in a "drug-free zone"—i.e., within a certain distance of various statutorily defined facilities. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.134. Here, the State alleged that Curlee possessed methamphetamine within 1,000 feet of a "playground," as defined by § 481.134(a)(3). *Id.* Subsection (a)(3) defines a "playground" as: any outdoor facility that is not on the premises of a school and that: (A) is intended for recreation; (B) is open to the public; and (C) contains three or more play stations intended for the recreation of children, such as slides, swing sets, and teeterboards. *Id.; Graves v. State*, 557 S.W.3d 863, 866 (Tex. App.—Houston [14th Dist.] 2018, no pet.).

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of the various gates to the playground were locked except one.

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III. MOTION FOR NEW TRIAL

By his third issue, Curlee argues that the trial court erred by failing to hold a hearing on his motion for new trial, which was timely, properly presented to the trial court, and requested a hearing. Curlee's motion for new trial complained in part of "outside influence" on the jury based on the notation in Jury Note 3, "Talked to Pastor."

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App. 2005). A trial court abuses its discretion in failing to hold a hearing if the motion and accompanying affidavits (1) raise matters that are not determinable from the record; and (2) establish reasonable grounds showing that the defendant could potentially be entitled to relief. *Hobbs*, 298 S.W.3d at 199; *see also Bolivar v. State*, No. 13-14-00157-CR, 2016 WL 4939384, at *17 (Tex. App.—Corpus Christi–Edinburg Sept. 15, 2016, pet. ref'd) (mem. op.) (not designated for publication).

B. Discussion

During Investigator Smejkal's testimony regarding the church playground, he was asked by the prosecutor how he knew the playground was unlocked, and he replied that he spoke to the pastor. Defense counsel objected to hearsay and the trial court sustained the objection. The trial court responded after discussing the jury's note with the prosecutor and defense counsel. The trial judge told the jury in writing that he and the court reporter would look for the testimony over the lunch break. As the trial court discussed with counsel in Curlee's presence, the response, "Talked to the Pastor," was hearsay to which an objection had been sustained and would not be provided to the jurors when they came back into the courtroom.[3]

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[3] Before the trial court brought the jury back in to read the requested testimony, he advised the parties:

> THE COURT: Back on the record after a question from the jury about read-back. Here is the question that was asked: "Please provide Investigator Smejkal's testimony regarding church/playground and locks. Testimony was 4/23/19, particularly on whether public property or not, signed Carley Smith. Also talked with pastor." Okay. I'm going to go through —I've searched the record. Anything that has to do with that question I'm going to read to the jury. I will tell everybody on the—"also talked with pastor," that's—will not come in because the question was, "How do you—Smejkal, how do you know that it's public property?" And Smejkal said, "I talked with the pastor." The objection was hearsay, and it was sustained, so that won't come in.

did not actually occur. Instead the evidence he relies on refers to an evidentiary matter that occurred during trial and not outside the record. As a result, the trial court was not required to hold a hearing. *See Sandoval v. State*, 929 S.W.2d 34, 36 (Tex. App.—Corpus Christi–Edinburg 1996, pet. ref'd) (holding that trial court did not abuse its discretion in denying hearing on motion for new trial where reasonable grounds to believe a new trial was warranted were not shown). Thus, the trial court did not abuse its discretion by denying the motion without a hearing. *Id.*

We overrule Curlee's third issue.

IV. CONCLUSION

We affirm the judgment of the trial court

GINA M. BENAVIDES,
Justice

Publish.
TEX. R. APP. P. 47.2 (b).

Delivered and filed the
11th day of June, 2020.

APPENDIX 4

THE THIRTEENTH COURT OF APPEALS

13-19-00237-CR

DALLAS SHANE CURLEE
v.
THE STATE OF TEXAS

On Appeal from the
24th District Court of Jackson County, Texas
Trial Court Cause No. 18-1-10,036

JUDGMENT

This Court's judgment issued on April 30, 2020, is hereby withdrawn and the following is substituted therefor.

THE THIRTEENTH COURT OF APPEALS, having considered this cause on appeal, concludes that the judgment of the trial court should be AFFIRMED. The Court orders the judgment of the trial court AFFIRMED.

We further order this decision certified below for observance.

June 11, 2020